Editor's note: Reconsideration denied by order dated April 26, 1978

JOE STEWART

IBLA 77-472 Decided December 28, 1977

Appeal from the issuance of a "Notice to Remove Unauthorized Improvements on United States Land," dated June 23, 1977, and served on June 24, 1977, by the Vale, Oregon, District Office, Bureau of Land Management. TD 025546.

Affirmed.

1. Trespass: Generally -- Evidence: Sufficiency

   An assertion by an alleged trespasser that he holds the right to graze and enclose Federal range must be documented to rebut the Government's prima facie case of trespass.

2. Rights-of-Way: Act of March 3, 1891 -- Rights-of-Way: Nature of Interest Granted -- Trespass: Generally

   The grantee of a right-of-way for irrigation or drainage purposes may not fence the right-of-way unless it is necessary to protect the grantee's use. Where the necessity of protecting an irrigation reservoir from incursion by cattle did not appear on the record, and the fence was not so located as to serve that purpose, fencing the reservoir constituted a trespass.

3. Color or Claim of Title: Good Faith

   Good faith possession under color or claim of title requires that the claimant possess the land without knowing or having reason to know that title to the land was vested in the United States. Where the claimant holds a right-of-way granted by the United States

covering the land in question and has received periodic notifications of trespass from Federal officers, there is no good faith possession.

4. Color or Claim of Title: Generally

Color or claim of title to Federal land requires an instrument which, on its face, purports to convey the tract in question.

APPEARANCES: Barry Marcus, Esq., Marcus and Marcus, Boise, Idaho, and Stephen B. Fonda, Esq., Henigson, Stunz and Fonda, Nyssa, Oregon, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Joe Stewart appeals form a "Notice to Remove Unauthorized Improvements on United States Land," dated June 23, 1977, and served by the Vale, Oregon, District Office, Bureau of Land Management (BLM), on June 24, 1977. The notice states, inter alia: "[A]ll said improvements are hereby required to be removed from said land on or prior to July 15, 1977, and in the absence of such removal * * * the United States, without further or any additional notice of any kind whatsoever, and without liability may destroy or remove said improvements." Referred to is approximately a 2-1/2 mile barbed wire fence enclosing a parcel in excess of 300 acres located in secs. 28 and 29, T. 32 S., R. 45 E., Willamette Meridian, Malheur County, Oregon. The disputed land was segregated by multiple-use retention classification, November 16, 1976, 32 FR 16108 (November 23, 1967). BLM had previously charged Appellant with unauthorized grazing and water impoundment on this same parcel.

Appellant concededly holds legal title to three nearby parcels including a parcel bordering the disputed land on the north, which he has cultivated. These parcels were originally patented as desert land entries, in two cases, and as a homestead, in one case, and held by one of Appellant's predecessors-in-interest, Arthur C. Lee. Appellant also controls (under a right-of-way originally issued in 1921 to Lee) the "Deary Reservoir," a 360 acre-foot irrigation reservoir extending into both Appellant's cultivated parcel and the disputed land.

Pursuant to section 3 of the Taylor Grazing Act, 43 U.S.C. @ 315b (1970), grazing rights to the Soldier Creek area, to which the disputed land belongs, were comprehensively adjudicated in January 1956. Neither Appellant nor any of his predecessors-in-interest received any grazing rights.

BLM's threatened removal of the fence culminates more than 2 years of negotiations between Appellant and BLM over Appellant's rights to graze approximately 50 head of cattle and two horses on the parcel, and to maintain the fence. In the spring of 1977, it briefly appeared that a settlement might be feasible. Appellant paid $ 125 in trespass damages and agreed to an arrangement in which he would apply for a desert land entry patent on the parcel and in the interim seek a temporary grazing permit. The settlement collapsed, however, when a competing grazing operator refused to accede to the arrangement, and when Appellant's desert land entry application was denied. Service of the present notice followed. Notice of appeal was received on July 22, 1977, and the statement of reasons was received on August 10, 1977.

Appellant has consistently maintained that he has the right to graze and enclose the land based on the occupancy of the land beginning in 1904 by Arthur C. Lee. As previously mentioned, Lee held the patented land and the right-of-way now in Appellant's control. Lee allegedly constructed the fence in 1920 although BLM claims that at least some portions were recently constructed by Appellant. Lee allegedly transferred his rights to Fred Murdock and W. Adams on September 25, 1946, with Murdock allegedly conveying his interest to Appellant in 1968. No evidence of the conveyances beyond Appellant's assertions appears in the record.

Appellant suggests at least three distinct theories to justify his right to maintain the fences. First, Appellant maintains that, in addition to the grants described above, Lee received another patent or other formal grant covering the disputed land from which Appellant now derives rights. Second, Appellant asserts that the rights encompassed by Lee's reservoir right-of-way include the right to build a fence. Finally, Appellant believes that he has gained rights on the disputed property from his and his predecessor's long term undisturbed occupancy. 1/

Since the land in question is public land, BLM properly issued the trespass notice unless Appellant has a right to maintain the fences. We proceed therefore to consider each of Appellant's theories in turn.

[1] We may quickly reject Appellant's first theory. Appellant has furnished no corroboration of his claim that Lee received any formal grants other than his right-of-way and the patents previously mentioned. Without such corroboration we cannot give credence to Appellant's claim.

1/ Appellant also challenges the propriety of the 1956 grazing rights adjudication. Time for disputing that adjudication, however, has long since passed.

[2] Appellant's reservoir right-of-way similarly fails to provide a basis for enclosure and grazing. Rights-of-way authorizing the impoundment of water for irrigation purposes under the Act of March 3, 1891, section 18 et seq., 43 U.S.C. @ 946 et seq. (1964), do not grant exclusive use of the waters impounded except as necessary to protect the grantee's use. U.S. v. Bighorn Land and Cattle Company, 17 F.2d 357 (8th Cir. 1927); Whitmore v. Pleasant Valley Coal Company, Inc., 75 P. 748 (Utah, 1904); Grindstone Butte Project, 18 IBLA 16 (1977); Zelph S. Calder, 16 IBLA 27, 81 I.D. 339 (1974). 2/ Thus, no fence may be constructed except as necessary to protect the reservoir. Appellant contends that he has maintained the fence out of necessity to prevent cattle from wandering into the reservoir and destroying its soil seal and that a fence closer to the reservoir would not hold. This claim however, is at odds with the record. Photographs included in the record show that the fence deviates markedly from the boundary of the reservoir and bears no logical relationship to it. From a point less than one-eighth mile from the reservoir, the fence extends to more than a mile away. All told, the fence encloses an area many times greater than that of the reservoir. Furthermore, other photographs and BLM surveys reveal that a large number of cattle have been permitted to graze within the ambit of the fence. These observations deprive Appellant's assertion of credibility.

For Appellant to derive rights from long term occupancy of the parcel, he must fall within the provisions of the Color of Title Act, 43 U.S.C. @ 1068 (1964).

While he has not filed an application for a patent under that Act, Appellant does allege that he and his predecessors have occupied the tract since 1904. He has not, however, presented even a prima facie case for a color of title claim. The Act states:

> The Secretary of the Interior * * * shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years, and that

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2/ Appellant claims that his right-of-way grant encompasses rights under the Act of January 13, 1897, 43 U.S.C. @ 952 (1964): "Reservoir sites for water for livestock." Arthur C. Lee's original water use permit, however, restricts the use of water to irrigation purposes. In any event, reservoirs for livestock watering are open to the free use of any person desiring to water animals of any kind and may not be fenced without authorization from the Secretary of the Interior. Id., 43 CFR 2872.0-3(b), 2872.1(b)(5), 2872.6. Neither Appellant nor his predecessors applied for or received a right to build, let alone fence, a livestock reservoir.

> valuable improvements have been placed on such land or some part thereof has been reduced to cultivation * * * issue a patent for not to exceed one hundred and sixty acres * * *.

Outside the Color of Title Act there can be no adverse possession against the United States. U.S. v. California, 332 U.S. 19 (1947); U.S. v. Gossett, 416 F.2d 565 (9th Cir. 1969); Manley Rustin, 28 IBLA 205 (1976).

On the record before us Appellant would fail to meet the requirements of the Act on two counts. He has failed to show a 20-year period of possession in good faith, and he has failed to show color of title.

[3] Good faith requires that the claimant possess the land without knowing or having reason to know that title to the land vested in the United States. Day v. Hickel, 481 F.2d 473 (9th Cir. 1973); Lawrence E. Willmorth, 32 IBLA 378 (1977); Joe I. and Calina V. Sanchez, 32 IBLA 228 (1977); Minnie E. Wharton, 4 IBLA 287, 79 I.D. 6 (1973), rev d on other grounds U.S. v. Wharton, 514 F.2d 406 (9th Cir. 1975). In the present case, Appellant, his predecessor, Murdock, and his ultimate predecessor, Lee, all held a right-of-way from the United States which they claim covers the same land for which Appellant now asserts title. Moreover, there is evidence on the record that BLM had periodically apprised the occupiers of the land that they were trespassers. Under these circumstances we hold that Appellant and his predecessors had reason to know that title to the parcel vested in the United States and that therefore they were not good faith possessors.

[4] A second deficiency in Appellant's claim is that he lacks color of title, which requires conveyance of the land by an instrument which, on its face purports to convey the tract in question. U.S. v. Wharton, supra; Day v. Hickel, supra; Manley Rustin, supra; Mildred A. Powers, 27 IBLA 213 (1976); Estate of James J. Lee, Deceased, 26 IBLA 102 (1976); Cloyd and Velma Mitchell, 22 IBLA 299 (1975); James E. Smith, 13 IBLA 306, 80 I.D. 702 (1973); Marcus Rudnick, 8 IBLA 65 (1972). No colorable deed between Lee and Murdock, or Murdock and Appellant appears in the record (nor is there even documentation of the right-of-way's conveyance). Without such evidence, Appellant could not establish color of title.

Failing to establish a formal grant of title, a sufficient right-of-way, or possession under color of title, Appellant fails to rebut the prima facie case of trespass made out by BLM. BLM was therefore correct in issuing the trespass notice.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge